In The

Supreme Court of the United States

October Term, 1974

No. 73-2024

ROBERT WARTH, Individually and on behalf of all other persons similarly situated, LYNN REICHERT, Individually and on behalf of all other persons similarly situated, VICTOR VINKEY, Individually and on behalf of all other persons similarly situated, KATHERINE HARRIS, Individually and on behalf of all other persons similarly situated, ANDELINO ORTIZ, Individually and on behalf of all other persons similarly situated, CLARA BROADNAX, Individually and on behalf of all other persons similarly situated, ANGELEA REYES, Individually and on behalf of all other persons similarly situated, ROSA SINKLER, Individually and on behalf of all other persons similarly situated, METRO-ACT OF ROCHESTER, INC., HOUSING COUNCIL IN THE MONROE COUNTY AREA, INC., ROCHESTER HOME BUILDERS ASSOCIATION, INC.,

Petitioners,

vs

IRA SELDIN, Chairman, JAMES O. HORNE, MALCOLM M. NULTON, ALBERT WOLF, JOHN BETLEM, as members of the Zoning Board of the Town of Penfield; GEORGE SHAW, Chairman, JAMES HARTMAN, JOHN D. WILLIAMS, RICHARD C. ADE, TIMOTHY WESTBROOK, as members of the Planning Board of the Town of Penfield; IRENE GOSSIN, Supervisor, FRANCIS J. PALLISCHECK, DR. DONALD HARE, LINDSEY EMBREY, WALTER W. PETER, as members of the Town Board of the Town of Penfield, and the TOWN OF PENFIELD, NEW YORK,

Respondents.

— *over* —

Daily Record Corporation
Rochester, New York

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Emmelyn Logan-Baldwin, Esq.
19 Arnold Park
Rochester, New York 14607

Robinson, Williams, Robinson & Angeloff
by Frank Aloi, Esq.
700 Reynolds Arcade Building
Rochester, New York 14614

Liebschutz, Rosenbloom & Samloff
by Sanford Liebschutz, Esq.
101 Powers Building
Rochester, New York 14614

Monroe County Legal Assistance Corp.
by Daan Braveman, Esq.
Michael Nelson, Esq.
80 West Main Street
Rochester, New York 14614

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

In The

Supreme Court of the United States

October Term, 1974

No.

ROBERT WARTH, Individually and on behalf of all other persons similarly situated, LYNN REICHERT, Individually and on behalf of all other persons similarly situated, VICTOR VINKEY, Individually and on behalf of all other persons similarly situated, KATHERINE HARRIS, Individually and on behalf of all other persons similarly situated, ANDELINO ORTIZ, Individually and on behalf of all other persons similarly situated, CLARA BROADNAX, Individually and on behalf of all other persons similarly situated, ANGELEA REYES, Individually and on behalf of all other persons similarly situated, ROSA SINKLER, Individually and on behalf of all other persons similarly situated, METRO-ACT OF ROCHESTER, INC., HOUSING COUNCIL IN THE MONROE COUNTY AREA, INC., ROCHESTER HOME BUILDERS ASSOCIATION, INC.,

Petitioners,

vs

IRA SELDIN, Chairman, JAMES O. HORNE, MALCOLM M. NULTON, ALBERT WOLF, JOHN BETLEM, as members of the Zoning Board of the Town of Penfield; GEORGE SHAW, Chairman, JAMES HARTMAN, JOHN D. WILLIAMS, RICHARD C. ADE, TIMOTHY WESTBROOK, as members of the Planning Board of the Town of Penfield; IRENE GOSSIN, Supervisor, FRANCIS J. PALLISCHECK, DR. DONALD HARE, LINDSEY EMBREY, WALTER W. PETER, as members of the Town

Board of the Town of Penfield, and the TOWN OF PENFIELD, NEW YORK,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

Petitioners, Robert Warth, Lynn Reichert, Victor Vinkey, Katherine Harris, Andelino Ortiz, Clara Broadnax, Angelea Reyes, Rosa Sinkler, individually and on behalf of all other persons similarly situated, Metro-Act of Rochester, Inc., Housing Council in the Monroe County Area, Inc., and Rochester Home Builders Associations, Inc., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter on April 18, 1974.

Opinion Below

The judgment of the Court of Appeals for the Second Circuit, which was entered on April 18, 1974, affirmed the District Court's dismissal of the complaint and the denial of a motion to intervene on the ground that plaintiffs and intervenors lack standing. The opinion is attached hereto as Appendix A. The opinion of the District Court for the Western District of New York, dated December 27, 1972, is attached hereto as Appendix B and is not officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 18, 1974, and this Petition for Certiorari was filed within ninety (90) days from that date. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

Question Presented

Whether individual and organizational plaintiffs have standing to challenge defendants' racially discriminatory and exclusionary zoning ordinance, practices, and policies which deprive plaintiffs of constitutional and statutory rights and cause them to suffer economic damage and loss of the social benefits of living in an integrated community.

Constitutional and Statutory Provisions

This petition involves the First, Ninth and Fourteenth Amendments to the Constitution of the United States; 42 U.S.C. § 1981; 42 U.S.C. §1982; and 42 U.S.C. § 1983. (Pertinent constitutional and statutory provisions are set forth in Appendix C.)

Statement of Case

Plaintiff-petitioners are individuals and organizations which have been adversely affected both by the Town of Penfield's zoning ordinance and by defendants' administration of that law. The named plaintiffs instituted this action on behalf of themselves and a class consisting of all taxpayers residing in the contiguous City of Rochester, New York, all low and moderate income persons residing in the City, all black and Spanish-surnamed citizens residing in the City of Rochester, and all persons employed, but excluded from living, in the Town of Penfield who are, or may in the future be, affected by defendants' racially discriminatory and exclusionary zoning practices and policies. (Pertinent portions of Penfield Zoning Ordinance are set forth in Appendix D.)

Defendants-respondents are the individual members of the Zoning Board, Planning Board, and Town Board of the Town of Penfield, Monroe County, New York. Additionally, the suburban Town of Penfield, New York, which is a municipal corporation adjacent to the City of Rochester, New York, is a defendant-respondent in this action.

Petitioners[1] instituted this action alleging that defendants' zoning ordinance, as enacted and administered, excludes members of minority groups[2] and low income persons from residency in the Town of Penfield, New York. As a result of the exclusionary and discriminatory zoning ordinance, as well as defendants' implementation of that ordinance, petitioners have been, and are being, forced to suffer the deprivation of rights secured by the First, Ninth and Fourteenth Amendments to the Constitution of the United States and by the Civil Rights Act of 1866[3] and the Civil Rights Act of 1871.[4]

The District Court for the Western District of New York[5] dismissed the complaint for lack of standing and failure to state a claim upon which relief could be granted. The Second Circuit affirmed solely on the ground that petitioners lack standing. Petitioners now seek review of that determination.

For purposes of the motion to dismiss in the District Court, as well as this petition for certiorari, plaintiffs' factual allegations must be accepted as true. These allegations reveal that the purpose and effect of Penfield's zoning ordinance, as enacted and administered, are to prohibit nonwhite and nonaffluent

---

[1] Petitioners WARTH, REICHERT, VINKEY, HARRIS, ORTIZ, BROADNAX, REYES, SINKLER and METRO-ACT OF ROCHESTER, INC. are the named plaintiffs on the complaint.

Petitioner, HOUSING COUNCIL IN THE MONROE COUNTY AREA, INC. requested to be added as a party plaintiff and petitioner, ROCHESTER HOME BUILDERS ASSOCIATION, INC., sought leave to intervene. The District Court denied the requests and the Court of Appeals for the Second Circuit affirmed on the ground that these parties, as well as the named plaintiffs, lack standing. *Warth v. Seldin*, —F.2d—, —. Appendix A, infra, at 3.

[2] In 1970, only 60 of the 23,782 persons residing in Penfield were black. See Affidavit of Warth, Reichert, Vinkey and Harris, at paragraph 9.

[3] 42 U.S.C. §§1981, 1982

[4] 42 U.S.C. §1983

[5] Jurisdiction is conferred upon the District Court by virtue of 28 U.S.C. §§1331 and 1343.

persons from residing in the Town of Penfield. The ordinance effectively bars the construction of any multiracial, low and moderate income housing in this suburban town. Indeed experts who have examined the ordinance have concluded:

> "Overall, the residential control aspects of the Penfield zoning ordinance must be classified as highly restrictive — essentially disallowing the construction of any new housing for low and moderate income individuals. Furthermore, in terms of public health, safety and welfare, there is no apparent justification to support the highly restrictive requirements of the residential (housing) provisions of the Penfield zoning ordinance. The zoning ordinance is not based on any current comprehensive plan and its provisions (for large lots, etc.) are neither explained nor justified within the ordinance nor within any planning document (known to these reviewers)."[6]

Defendants have accomplished this highly restrictive and exclusionary residential control by mandating such excessive requirements for house set back, lot size, lot width, minimum floor area and habitable space that in 1972, when this action was commenced, it was impossible to construct a single family dwelling in Penfield which cost less than $29,115.00 — a price far beyond the reach of most minority and low income persons. Pursuant to the zoning law, ninety-eight percent of all vacant land in the Town of Penfield is earmarked for construction of such single family housing. Only three-tenths of one percent of the vacant land is available for multi-family structures. Yet, even on this limited space, construction of multiracial, low and moderate income housing is precluded because the zoning ordinance requires low density for the apartment units and other unnecessary costs such as two parking spaces per unit and an enclosed garage for every unit. The construction of townhouses, use of mobile homes, or implementation of planned unit development are alternatives for providing adequate housing for

---

[6]Affidavit of Kling, Taddiken, and Farley, at paragraph 17.

minority and low income families. However, defendants have established a series of rigid dimensional and density requirements which effectively prohibit the use of any of those alternatives.

In the posture of the instant case, the conclusion of the experts who have examined the ordinance is uncontradicted and binding upon this Court. Those experts agree that "The Penfield zoning ordinance is basically an inflexible control mechanism which has the effect of *producing economically and racially stratified housing arrangements* without apparent regard for the housing needs either of its own citizenry or for the citizenry within the larger metropolitan community." (emphasis added).[7]

Equally arbitrary and discriminatory is defendants' administration of the challenged ordinance. Defendants have continued their exclusionary practice by refusing to grant variances and building permits and by improperly using a special permit procedure. Moreover, they have failed to amend or waive certain provisions of the ordinance, including the zoning map and building specification requirements. So too, defendants refuse to either grant necessary tax abatements or cooperate with, assist and accommodate applicants for low and moderate income housing units. One member of Metro-Act of Rochester, Inc., who is a Penfield resident and was a participant in a project proposal for multiracial, low and moderate income housing, summarizes defendants' practices as 1) delaying action on proposals for inordinate periods of time; 2) denying approval of proposals for arbitrary reasons; 3) failing to provide necessary support services for low and moderate income housing units; and 4) amending the zoning ordinance to make the approval of such units virtually impossible.[8]

---

[7]Id.

[8]Affidavit of Ann McNabb, at paragraph 4.

It is beyond cavil that Penfield's zoning ordinance has an exclusionary and racially discriminatory impact and that defendants' administration of the ordinance perpetuates the economically and racially stratified housing arrangements in the Town of Penfield. Yet, the Second Circuit held that plaintiffs do not have standing to challenge defendants' exclusion of non-white and nonaffluent families who are in desperate need of adequate housing units. In so doing, the court ignored the actual physical, economic and social injury suffered by the individual and organizational plaintiffs as a result of the zoning law and defendants' practices and policies in administering the ordinance.

Plaintiffs-petitioners, Ortiz, Broadnax, Reyes, and Sinkler, are persons of low or moderate income who have been excluded from the Town of Penfield because of their race and low income level. Plaintiff Ortiz, for example, is a Spanish-surnamed American who was dissatisfied with raising his children in the "ghetto environment" which exists in the decaying inner city section of Rochester, New York. Accordingly, in 1968 he began searching for a home in one of the surrounding suburban towns. Since at that time, and until May, 1972, he was working in the Town of Penfield, he initiated inquiries about renting or buying a home in that suburb. However, no multiracial, low and moderate income housing units were available and, thus, petitioner was forced to reside in Wayland, New York which is forty-two miles from his job in Penfield. Petitioner described his inconvenience and cost as follows:

> "Since I was unable to locate housing near my work in the Town of Penfield (employment dating from my arriving in Rochester in 1966 to May 1972) I have been forced by reason of the exclusionary practices of the Town of Penfield to reside in Wayland, New York, Town of Springwater (1971 through May 1972) forty-two miles from my work in Penfield. I worked five days a week, eight hours a day at St. Joseph's. I was at work

> by 7:30 in the morning. Travel one way to the job in Penfield took at least one hour and ten minutes one way — in bad weather, the time involved one way to work was about two hours. The maximum distance from my job if I had been able to live in the Town of Penfield would have involved driving time of no more than twenty minutes to the job at St. Joseph's.
>
> ". . . there was at least $2.56 involved each day in gasoline costs for my automobile or $12.80 involved in gasoline costs alone for my automobile to and from my work each week. Thus, in costs of gasoline alone, commuting to and from the job in Penfield has cost me $666.00 per year."[9]

The injury suffered by Ortiz is not limited to the burdensome commuting problems and costs. Rather, as he concluded, "Because our living environments are dictated by laws, practice and policies which prevent us from living where we might wish, we are forced, for example, to accept as a way of life, poor schools for our children, reduced job opportunities, inferior community services and added expenses of reaching employment."[10] The injury to Ortiz and his family is certainly not "too abstract, conjectural, and hypothetical to establish an Article III case or controversy."[11]

So too, plaintiffs Broadnax, Reyes and Sinkler and their respective families, have suffered actual injury as the result of defendants' exclusionary practices and policies. These plaintiffs sought housing in the Town of Penfield, but were excluded because of their race and income levels. The inner city environment in which they must reside is characterized by dilapidated, substandard housing, uncontrolled violence and insufficient or nonexistent community services. As a result of

---

[9] Affidavit of Andalino Ortiz, at paragraphs 13-14.

[10] Id. at paragraph 31.

[11] *Warth v. Seldin*, supra at —, Appendix A, infra at 12.

defendants' practices and policies of excluding low income persons and members of minority groups, plaintiffs are being denied their right to raise their children in an integrated environment and obtain the benefits of the improved housing conditions and community services in Penfield. One of the prime concerns of these plaintiffs is the educational disadvantages which their children are forced to suffer. Plaintiff Sinkler states:

> "I have sought housing accommodations in the Rochester metropolitan area, including the Town of Penfield — all to no avail because I am a black person of low income. I would like an opportunity to live in the Town of Penfield; I believe I have a right to live in the Town of Penfield and to have access to decent housing in a decent environment.
>
> "One of the most important reasons for my desiring to have an opportunity to live with my family in decent housing in a decent environment is my great concern that my children have an adequate education. I have already noted that I found the instruction in the public kindergarten and first grade to be so inadequate that I transferred my child to a parochial school. I understand that the public school in my area, school No. 20, has been rated among studies of Rochester City Schools as one of the lowest in terms of effective instruction of students. On the other hand, the Town of Penfield's schools rate high in studies which evaluate area schools. The Town of Penfield by its exclusionary policies, practices and laws has and continues, therefore, to cause me real harm by denying me the opportunity to reside there."[12]

Plaintiffs Warth, Reichert, Vinkey, and Harris suffer actual economic injury as a direct result of Penfield's exclusionary zoning ordinance and defendants' administration of that law. Each of these plaintiffs is a taxpayer and property owner residing in the City of Rochester, New York. They have alleged

---

[12] Affidavit of Rosa Sinkler, at paragraphs 16-17.

that defendants' exclusion of low and moderate income housing units forces the City of Rochester to assume the ever increasing burden of providing such housing, much of which is tax abated. As the amount of tax abated property in the City increases, individual property owners and taxpayers, such as plaintiffs, must assume a larger burden of the taxes which are needed to finance essential services. The tax rate in Rochester, for example, has continually risen from $42.06 per $1,000 assessed valuation in 1959 to $80.95 in 1972. This increased financial burden on property owners residing in the City of Rochester is attributable, in part, to the fact that Penfield refuses to provide its fair share of tax abated low and moderate income property and thus forces the City and its taxpayers to assume the cost.

Manifestly, plaintiffs Warth, Reichert, Vinkey and Harris have such a personal economic stake in the continuance of this litigation as to ensure the requisite concrete adverseness. Each of these plaintiffs is being forced to assume not only the economic hardship caused by spiraling property taxes, but also the social and environmental problems resulting from the concentration of multifamily, low and moderate income housing units in the urban area. "The effect of Penfield's exclusionary practices which create a concentration of low, moderate housing in the City of Rochester and produce . . . a density crush, also has direct effect on the City of Rochester residents in incidents of crime and provisions for law enforcement."[13]

Petitioners further contend that the organizational plaintiffs are also injured by defendants' zoning practices and policies and, accordingly, have standing to assert their claims in this action. Rochester Homebuilders Association, Inc., is a nonprofit trade association of persons and companies engaged in construction, development, and maintenance of residential housing in the metropolitan Rochester area. Over 110 of its members are engaged directly in the construction of sale and rental housing to

[13] Affidavit of Warth, Reichert, Vinkey and Harris, at paragraph 19.

the public at large. During the past 15 years, approximately 80% of the private housing units constructed in the metropolitan Rochester area — including the Town of Penfield — were constructed by members of this trade association.

The District Court denied the Home Builders Association's request to intervene and the Second Circuit affirmed the denial on the ground that the Association lacks standing. Once again, the court ignored the substantial economic injury which members of the Association have suffered as a direct consequence of defendants' exclusionary zoning practices and policies. Indeed, the uncontradicted affidavit submitted in support of the motion to intervene states that members of the Association have been unable to construct low and moderate income housing in Penfield as a result of the zoning ordinance and defendants' administration of that law:

> "The Rochester Home Builders Association alleges that they have been subject to the same discriminatory and exclusionary zoning practices as alleged in Plaintiffs' Complaint, and as a result thereof have been unable to construct housing and provide same for all of the metropolitan Rochester area population which is entitled to the opportunity to purchase such housing, *and that specifically members of the Rochester Home Builders Association have been denied relief from such zoning ordinances permitting them to construct such housing.*" (emphasis added).[14]

The Association specifically alleges that Penfield's restrictive zoning ordinance and defendant's implementation of the law has prevented, and continues to prevent, members of the Association from developing, selling and renting housing to all the members of the metropolitan Rochester area which might require low and moderate income housing. As a result, members of this organization are being deprived of substantial business opportunities and profits and have suffered damage in the amount

[14] Affidavit of Sanford Liebschutz, Esq., at paragraph 3.

of $750,000.00. Petitioners submit that it is difficult, indeed, to imagine a party with a greater economic stake in the outcome of this litigation than the Rochester Homebuilders Association, Inc. and its members.

Similarly, Metro-Act of Rochester, Inc., and its members have suffered direct injury as a result of defendants' practices and policies and, consequently, have a personal stake in the resolution of this matter. Metro-Act, a nonprofit corporation, was founded in 1964, after the riots in the decaying inner city of Rochester, and is now composed of approximately 350 individual members. One of its primary purposes is to pursue activities designed to secure open housing in the Rochester suburbs. Specifically, Metro-Act, has presented the Town of Penfield with a number of proposals to end the racially exclusionary zoning practices and policies existing in Penfield. Robert Warth, President of Metro-Act in 1971-72, commented on defendants' unwillingness to consider such proposals:

> "After making such a tremendous effort to discuss the Penfield housing problems with the Town Board officials and meeting with an attitude of unwillingness on the part of the Town of Penfield officials to consider Metro Act's proposals or even to meet and discuss the proposals, Metro Act members had the clear impression that the objective of the Town of Penfield was to delay indefinitely any real meeting with Metro Act members or a real consideration of the Metro Act proposal. Under the circumstances, there was no other alternative than to initiate this lawsuit."[15]

As a result of the exclusionary zoning ordinance and defendants' administration of the law, Metro-Act members are suffering direct injury in that they are losing the benefits of living in an integrated community. As Mr. Warth stated, "Metro-Act is working for open housing in the suburbs because, in part, only by providing maximum choice in housing can

---

[15]Affidavit of Robert Warth, at paragraph 14.

Metro-Act members and their children be spared an eventual repeat of ghetto confrontations and riots .... Metro-Act members believe that it is to their own children's benefit to learn early in life to come to healthy terms with different races and ethnic groups."[16] Although this injury inflicted upon Metro-Act members is not economic, it nevertheless is such a real and concrete harm, resulting directly from defendants' illegal practices and policies, as to ensure the requisite adverseness.

Finally, Housing Council in the Monroe County Area, Inc., has standing to assert that it and its members are adversely affected by defendants' exclusionary and socially discriminatory zoning practices and policies. The Housing Council is a non-profit corporation which was organized in response to a recommendation contained in a 1970 study prepared by the Rochester Center for Governmental and Community Research and entitled "Housing in Monroe County, New York." This study was prepared for the Metropolitan Housing Committee, which was appointed jointly by the City and County Managers under authorization from the Rochester City Council and the Monroe County Board of Supervisors. The study recommended, *inter alia*, that a housing council be established, composed of representatives of relevant agencies, institutions and groups interested in housing in order to channel the fragmented and uncoordinated housing efforts in the community into meaningful action. Accordingly, the Housing Council's purposes, as stated in its constitution, include the following:

> "The Corporation shall be organized and operated exclusively for the purpose of receiving, maintaining, or administering one or more funds of real or personal property, or both, and using and applying the whole or any part of the income and principal thereof for the charitable purpose of combating community deterioration, eliminating racial and economic prejudice

---

[16] Id., at paragraph 6.

and discrimination in housing, and lessening the burdens of government in the Monroe County area of New York . . ."[17]

The Housing Council's membership is comprised of seventy-one (71) public and private organizations which are actively participating in efforts to eliminate racial and economic discrimination in the housing market. At least seventeen (17) of the charter member groups have been involved, are involved, or hope to be involved directly in the development and construction of low and moderate income housing. Indeed, at least one such group, Penfield Better Homes Corporation, has been actively attempting to develop moderate income housing in the Town of Penfield, but has been stymied by its inability to secure the necessary approvals from the defendants in this action. Moreover, several of the charter member groups, including the Monroe County Department of Social Services, the City of Rochester's Department of Urban Renewal and Economic Development, and the Urban Renewal Agency, are government agencies which have a direct concern with and interest in the production of adequate, multiracial, low and moderate income housing in the metropolitan Rochester area.[18]

Petitioner, Housing Council, urges that Penfield's restrictive zoning ordinance and defendants' illegal actions are thwarting the efforts of the organization and its members to achieve the stated purposes and undertake activities to eliminate racial and economic prejudice and discrimination in the housing market in the metropolitan Rochester area. The Housing Council is not simply using this lawsuit as "a vehicle for the vindication of the value interests of concerned bystanders."[19] Rather, the

---

[17] Affidavit of John Mitchell, Executive Director of the Housing Council in the Monroe County Area, Inc., at paragraph 4.

[18] Id., at paragraphs 5-8.

[19] *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416 (1973).

organization, is asserting that the challenged zoning law and defendants' actions are inflicting harm on the Housing Council, itself, and its members. Indeed, defendants are preventing the Council and its members from pursuing specific activities designed to further the organization's purpose of receiving and administering funds of real or personal property and using the income and principal thereof to combat community deterioration and eliminate discrimination in the housing market.

Petitioners submit that each and every plaintiff in this action is suffering actual injury as a result of Penfield's restrictive zoning ordinance and defendants' practices and policies in administering that law. In these circumstances, each plaintiff has a sufficient stake in the outcome of this litigation to guarantee that the issues will be presented in an adversary context and in a form capable of judicial resolution.

Reasons for Granting the Writ of Certiorari

I.

The Decision Below is in Direct Conflict with Decisions of the Courts of Appeals of the Third, Fifth, Eighth, and Tenth Circuits.

The Second Circuit's determination that petitioners lack standing to challenge defendants' exclusionary and racially discriminatory zoning practices and policies is contrary to the decisions of other federal Courts of Appeals.

The issue confronting the Eighth Circuit in *Park View Heights Corporation v. City of Black Jack*, 467 F. 2d 1208 (8th Cir. 1972), was, as here, "the validity of a zoning ordinance which effectively prohibits the construction of multiracial, federally subsidized, moderate and low income housing . . . ." Id. at 1210. Plaintiffs, there, were two nonprofit corporations, the Inter-Religious Center for Urban Affairs, Inc. [hereinafter, ICUA] and Park View Heights Corporation, as well as eight

individuals. The individual plaintiffs were residents of the City of St. Louis who desired "to live in St. Louis County due to its better economic, educational and recreational environment but have been unable to find housing within an affordable price range." Id. at 1210 n.2 The District Court held that ICUA and Park View lack standing and that no case or controversy existed as between the individual plaintiffs and the defendants.

The Eighth Circuit, however, reversed this determination and concluded that plaintiffs have the requisite standing and that the issues are proper for judicial resolution. That court noted that the organizational plaintiffs have standing, on behalf of themselves and the individuals who might reside in the housing units, "to question whether the purpose and effect of the ordinance is to exclude low and moderate income individuals from the City of Black Jack . . ." Id. at 1212. Moreover the court underscored the injury to the individual plaintiffs:

> "The statistics cited by the plaintiffs indicate a great need to provide low and moderate income housing in the suburban areas, a need which Park View and ICUA are trying to fill. Any attempt to interfere with this program may work a visible and immediate hardship on the class of low and moderate income citizens of the City of St. Louis"

Id. at 1216.

Similarly the Fifth Circuit has held that potential residents of low and moderate income housing have standing to challenge the exclusion of such housing units. Individual plaintiffs in *Crow v. Brown*, 332 F. Supp. 382, 390 (N.D. Ga. 1971), contended "that they are being denied access to low rent public housing outside the racially concentrated areas of Fulton County due to the arbitrary action and thoughtless inaction of the County . . . ." The Fifth Circuit rejected the suggestion that the parties lack the requisite injury which is necessary to ensure that the issues will be presented in an adversary context. *Crow v. Brown*, 457 F. 2d 788, 790 (5th Cir. 1972). See also, *United*

Farmworkers of Florida Housing Project, Inc., v. City of Delray Beach, 493 F. 2d 799 (5th Cir. 1974) (individual farmworkers have standing to challenge actions which have stymied efforts to build federally assisted low income housing and which have a racially discriminatory effect). Similarly, the Tenth Circuit in *Dailey v. City of Lawton*, 425 F. 2d 1037 (10th Cir. 1970), held that potential residents of low income housing have standing to challenge refusal to permit construction of such housing units.

In *Shannon v. United States Department of Housing and Urban Development*, 436 F. 2d 809 (3d Cir. 1970), the Third Circuit was presented with an analogous problem. There, plaintiffs were "white and black residents (some homeowners and some tenants), businessmen in, and representatives of private civic organizations in the East Popular Urban Renewal Area of Philadelphia." Id. at 811. They alleged that the placement of low and moderate income housing units on certain sites would have the effect of increasing the already high concentration of low income black persons. The court held that these plaintiffs have standing even though they were not potential residents of the housing units. The Third Circuit said, "The test, for Article III purposes, is whether or not plaintiffs allege injury in fact. They do indeed. They allege that concentration of low income residents in a 221(d)(3) rent supplement project in their neighborhood will adversely affect not only their investments in homes and businesses, but even the very quality of their daily lives." Id. at 818.

Petitioners submit that they, too, are injured by respondents' exclusionary and discriminatory zoning practices and policies. The Second Circuit, however, attempted to distinguish the instant case from these other decisions on the ground that they involved a particular housing proposal or project. The court stated, ". . . we note that the standing of potential residents in these cases presents an issue very different from the one presented here. The focusing of the controversy on a particular project assures 'concrete adverseness'."[20]

20*Warth v. Seldin*, supra at —, Appendix A, infra at 10.

Petitioners contend that such a distinction ignores the undisputed facts and is without merit. The underlying issue, here, involves both a zoning ordinance which prohibits multiracial low and moderate income housing units and official actions which have obstructed any attempt to build such housing. Members of Rochester Home Builders Association, Inc., have been unable to obtain the necessary relief from the zoning law to enable them to construct such housing units.[21] Metro-Act has submitted proposals which respondents have been unwilling to even consider.[22] Project proposals for construction of low and moderate income housing in Penfield have been stymied by respondents' practice of delaying action on proposals, denying approval for arbitrary reasons, failing to provide necessary support services, and amending the zoning ordinance to make approval virtually impossible.[23] In these circumstances, it would be anomolous, indeed, to deny petitioners standing to challenge Penfield's refusal to permit construction of low and moderate income housing on the ground that no such housing is presently being constructed in that Town.

Moreover, the fact that a particular project is under construction might ease plaintiffs' burden of showing the causal connection between defendants' actions and plaintiffs' injury. However, manifestly, it is not determinative of whether plaintiffs are actually suffering injury.

Accordingly, petitioners urge that this Court grant the Writ of Certiorari to resolve the conflict between the decision below and the decisions of the Third, Fifth, Eighth and Tenth Circuits.

---

[21]See note 14, supra.

[22]See note 15, supra.

[23]See page 6, supra.

II.

The Decision Below is in Conflict With Applicable Decisions of the Supreme Court of The United States

The Second Circuit determined that the individual and organizational plaintiffs lack standing to challenge Penfield's exclusionary and discriminatory zoning ordinance and defendants' administration of that law. In so doing, the court said:

> "Although the Supreme Court has discussed standing to sue on many occasions, certain aspects of the doctrine continue to present difficulties. Moreover, during the last few years the Court has revolutionized the law of standing. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins* 397 U.S. 159 (1970), the Court announced a two-pronged test of standing: the plaintiff must allege an "injury in fact," and must seek to protect an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Process, supra*, at 152-153. However, the Court has not explained what constitutes an "injury in fact." See Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 Case W. Res. L. Rev. 256, 258 (1971)."[24]

Although the Second Circuit recognized that "certain aspects of the [standing] doctrine continue to present difficulties," that court chose to ignore this Court's recent discussion of this very doctrine in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S.Ct. 2405 (1973).

There, various environmental groups instituted an action challenging the decision by the Interstate Commerce Commission to permit railroads to file a surcharge on freight rates. The named plaintiffs included SCRAP, an unincorporated

---

[24] *Warth v. Seldin*, supra at —, Appendix A, infra at 6.

association formed by five law students for the purpose of enhancing the quality of the human environment. The Association alleged that its members suffered economic, recreational, and aesthetic harm as a result of the rate increase. SCRAP maintained that each of its members was forced to pay more for finished products. Also, it was asserted that each of SCRAP's members uses the forests, rivers, streams and mountains and that such use would be adversely affected by the surcharge. Additionally, plaintiffs alleged that the rate increase resulted in increased air pollution. Finally, it was alleged that each member was "forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials" Id. at 678, 93 S.Ct. at 2411.

The Court held that SCRAP had standing to challenge the surcharge. Mr. Justice Stewart[25] stated that "[i]n interpreting 'injury in fact' we made it clear that standing was not confined to those who could show 'economic harm' . . . ." Id. at 686, 93 S.Ct. at 2415. Moreover, the Court added, "we have already made it clear that standing is not to be denied simply because many people suffer the same harm." Id. at 687, 93 S.Ct. at 2416. Finally the Court rejected any notion that a party must show that it is "significantly" affected by the challenged action:

> "The Government urges us to limit standing to those who have been 'significantly' affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved' and it serves to distinguish a person with a direct stake in the outcome of a litigation — even though small — from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no

---

[25]Mr. Justice Douglas and Mr. Justice Marshall joined in this part of the opinion of the Court. Mr. Justice Brennan and Mr. Justice Blackmun would hold that plaintiffs have standing even if they suffered no injury in fact.

> more at stake in the outcome of an action than a fraction of a vote. See Baker v. Carr., 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; a five dollar fine and costs, see McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 303; and a $1.50 poll tax, Harper v. Virginia Bd. of Education, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169" Id. at 689 n. 14, 93 S.Ct. at 2417 n. 14.

Id. at 689 n. 14, 93 S.Ct. at 2417 n. 14.

Petitioners, here, urge that they are suffering injury which is no more remote or speculative than that suffered by the parties in *SCRAP*. Petitioners Warth, Reichert, Vinkey and Harris, allege — as did plaintiffs in *SCRAP* — that they are suffering economic injury in that they are forced to pay higher property taxes as a result of respondents' actions. Petitioner Ortiz, as a direct result of respondents' exclusionary zoning practices and policies, was forced to live forty-two miles from his place of work in Penfield and suffer burdensome commuting problems and cost. Respondents' exclusion of nonaffluent and nonwhite persons also inflicts injury upon petitioners Broadnax, Reyes and Sinkler. These persons and their families have been excluded from Penfield because of their race and income level and have been forced to reside in the decaying inner city environment which is characterized by dilapidated, sub-standard housing, uncontrolled violence and insufficient or nonexistent community services. Moreover, these petitioners are suffering the real harm of being unable to raise their children in an integrated community and obtain the benefits of the improved housing conditions and services in the suburban Town of Penfield.

Similarly, the organizational petitioners, here, as in *SCRAP*, are suffering actual injury as a result of the challenged policies and practices. Indeed, Rochester Home Builders Association, Inc., alleged that its members, who have constructed over 80% of the housing units in metropolitan Rochester area, are being deprived of substantial business opportunities and profits as a

result of respondents' exclusion of multiracial, low and moderate income housing. Manifestly, such economic injury is more substantial than the "identifiable trifle" which has been held to be enough to confer standing. Id. (quoting Davis, Standing: Taxpayers and Others, 35 U.Ch. L.Rev. 601, 613).

So too, respondents' exclusionary and racially discriminatory zoning practices and policies are inflicting harm upon Metro-Act of Rochester, Inc., and its members. The organization, which has presented specific proposals to respondents concerning the elimination of the exclusionary zoning practices, has been prevented from pursuing activities designed to secure open housing in the metropolitan Rochester area. Moreover, the members of Metro-Act are suffering direct injury in that they are losing the social benefits of living in the integrated community. Although such injury is not economic, it nevertheless is real harm flowing directly from respondents' actions. Besides, as the Court said in *SCRAP*, "we made it clear that standing was not confined to those who could show 'economic harm.' " Id. at 686, 93 S.Ct. at 2415.

Finally, Housing Council in the Monroe County Area, Inc., is "injured in fact" by the Penfield zoning law and administration of that ordinance. This corporation was designed specifically for the purpose of receiving and administering funds or personal property for the purpose of combating community deterioration and eliminating racial and economic prejudice and discrimination in housing. The Housing Council and its members have been, and continue to be, prevented by defendants' actions from engaging in the necessary activities to further the purpose of receiving and administering such funds to eliminate discrimination in the housing market.

Petitioners contend that they are not simply concerned bystanders with a "mere interest in the problem." Id. at 689, n.14, 43 S.Ct. 2417 n.14. Rather, petitioners have a direct stake in the outcome of this litigation and, accordingly, have standing

under the principles enunciated in *SCRAP*.[26] Yet, the Second Circuit ignored the *SCRAP* decision and determined that petitioners are not injured in fact. Petitioners submit that the Second Circuit, in reaching this determination, did not concentrate solely on the existence of the harm, but rather erroneously focused on the difficulties petitioner might have in proving the causal relationship between respondents' actions and the alleged injury. The court said, for example, ". . . none of the named plaintiffs has suffered from any of the specific, overt acts alleged."[27] However, what this Court said in *SCRAP*, supra at 689-90, 93 S.Ct. at 2417, is equally applicable here:

> "If, as the railroads now assert, these allegations were, in fact, untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. We cannot say on these pleadings that the appellees could not prove their allegations which, if proved, would place them squarely among those persons injured in fact by the Commission's action, and entitled under the clear import of *Sierra Club* to seek review." (footnote omitted)

Petitioners request that this Court grant the Writ of Certiorari to resolve the inconsistency between the Second Circuit's determination and this Court's decision in *SCRAP*.

---

[26] The instant case is readily distinguishable from *United States v. Richardson*, — U.S. —; — S.Ct. — (1974) (42 U.S.L.W. 5076), and *Schlesinger v. Reservists Committee to Stop the War* — U.S. —; — S.Ct. — (1974) (42 U.S.L.W. 5088). Plaintiffs in those cases did not suffer the type of particularized concrete harm which has been inflicted upon petitioners here.

[27] *Warth v. Seldin*, supra at —, Appendix A, infra, at 11-12.

III.

The Decision Below Raises Significant and Recurring Questions of Federal Law Which Should Be Settled by this Court.

Congress has declared that the "general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing . . . and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . ." 42 U.S.C. §1441. See also *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 525 (1969). Moreover, "by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing . . . . Among other things, this reflects the recognition that in the area of public housing local authorities can no more confine low income blacks to a compacted and concentrated area than they can confine their children to segregated schools." *Crow v. Brown*, 332 F.Supp. 382, 390 (N.D. Ga. 1971), aff'd 457 F.2d 788 (5th Cir. 1972) (citations omitted) (footnote omitted).

Petitioners, here, seek to further these national housing goals and prohibit respondents from pursuing policies and practices which exclude multiracial, low and moderate income housing. As a result of these practices and policies, persons such as petitioners Sinkler, Broadnax and Reyes are being forced to live in substandard housing in the decaying inner city. Moreover, Penfield's exclusionary zoning ordinance and respondents' implementation of the ordinance are hastening the day when Rochester will become, in essence, a black city with a solid white perimeter. Accordingly, all petitioners are being deprived of the social benefits of living in an integrated community.

In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364 (1972), plaintiffs sought to challenge defendants' racially discriminatory housing practices. Plaintiffs alleged that they had been injured in that

> "They — the two tenants — claimed they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto'."

Id. at 208, 93 S.Ct. at 366 (footnote omitted). This Court held that plaintiffs had been injured by the "loss of important benefits from interracial associations" and, thus, had standing to challenge the discriminatory housing practices. Id. at 210, 93 S.Ct. at 367. Moreover, this Court said:

> "The dispute tendered by this complaint is presented in an adversary context. *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947. Injury is alleged with particularity, so there is not present the abstract question raising problems under Art. III of the Constitution. The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community,' 114 Cong. Rec. 2706, and as Senator Mondale who drafted §810(a) said, the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living quarters.' 114 Cong. Rec. 3472.

Id. at 211, 93 S.Ct. at 368.

This Court's resolution of the standing issue in *Trafficante* involved an interpretation of the Civil Rights Act of 1968, 42 U.S.C. §3610. Mr. Justice Douglas, writing for the Court, stated that it is unnecessary to reach the question of standing

under 42 U.S.C. § 1982. Id. at 209 n.8, 93 S.Ct. at 367 n.8. In view of this apparent limitation, the Second Circuit refused to apply the standing principles enunciated in *Trafficante* to the facts of the instant case.[28]

Petitioners submit that they, too, are suffering injury in fact due to the loss of benefits resulting from interracial associations and living in an integrated community. Accordingly, petitioners urge that this Court now hold that the standing requirements of *Trafficante* are equally applicable to this action under the Civil Rights Acts, 42 U.S.C. §§1981-1983. To hold otherwise would frustrate the national commitment to provide each American a decent home in a suitable, integrated living environment.

Petitioners pray that this court grant the Writ of Certiorari to resolve an important question of federal law and decide the issue which remains unsettled after *Trafficante*.

---

[28] *Warth v. Seldin*, supra at —, Appendix A, infra, at 13.

CONCLUSION

The decision below is in conflict with decisions of this Court as well as Courts of Appeals in other circuits and raises significant and recurring questions of federal law. Accordingly, the Writ of Certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Emmelyn Logan-Baldwin, Esq.
19 Arnold Park
Rochester, New York

Robinson, Williams, Robinson & Angeloff
by Frank Aloi, Esq.
700 Reynolds Arcade Building
Rochester, New York 14614

Liebschutz, Rosenbloom & Samloff
by Sanford Liebschutz, Esq.
101 Powers Building
Rochester, New York 14614

Monroe County Legal Assistance Corp.
by Daan Braveman, Esq.
Michael Nelson, Esq.
80 West Main Street
Rochester, New York 14614

Counsel for Petitioners

Dated: July 12, 1974